F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., McELWAINE, C.J. (S.S.)

AND GORDON-SMITH, J.

November 16, 1938.

MURUGAPPA CHETTIAR - (Appellant)

v.

LETCHUMANAN CHETTIAR (Respondent).

(SELANGOR CIVIL APPEAL No. 7 of 1937)

F.M.S. Appeals Order in Council, 1912—Rules 2 (a) & (b)—Appeal to Privy Council—Order of Court of Appeal directing trial of issues—whether a final order—Appellate Court's discretion in granting leave to appeal.*

On an Orginating Summons for an order for sale of certain lands the Judge made an order as prayed. One of the chargors (the appellant) appealed and the Court of Appeal remitted the summons to the Court of first instance for two issues to be tried and also ordered that on the determination of the said issues the respondent be at liberty, if so advised, to restore his application for sale of the lands. The respondent petitioned for leave to appeal to the Privy Council.

Held, by the Court Appeal dismissing the petition that the order of the Court of Appeal in directing certain issues to be tried and that the Originating Summons be reheard being in effect an order for retrial was not a final judgment or order within the meaning of Rule 2 (a) of the Rules under the F.M.S. Appeals Order in Council.

Held further, on reviewing the relative positions of the parties as would be affected by the trial of the issues, that no point of great general or public importance was involved such as would justify its being submitted to the Privy Council for decision under Rule 2 (b) of the Rules abovementioned.

Petition for leave to appeal to the Privy Council.

Cur. Adv. Vult.

Terrell, Ag. C. J.—A. K. M. L. Letchumanan Chettiar is the chargee of certain land in the district of Ulu Langat, and is hereinafter referred to as the chargee. The chargors are A. R. M. M. Meyappa Chettiar (hereinafter referred to as Meyappa), and K. M. C. T. Murugappa Chettiar (hereinafter called Murugappa). The charge was originally for $20,000, but it has been reduced to $15,500 by the payment of $4,500. Murugappa alleges that he or his predecessors in title paid the whole of this $4,500, but this question has not yet been finally determined. The chargors are the proprietors of the land in equal shares, but they are jointly and severally liable for the whole of the money due upon the charge.

*See Rules under Enactments Vol. 1, p. 102. [Ed. M.L.J.]

The chargee commenced these proceedings for the purpose of enforcing his charge by an order for sale. On the hearing of the Originating Summons, Murugappa alleged that each of the original chargors, now represented by Meyappa and Murugappa, received $10,000, and that having paid $4,500 there was only a balance of $5,500 due from him. This sum he paid into Court. He also alleged that Meyappa was the nominee of the chargor himself, and this appears to be admitted by Meyappa who wrote a letter to that effect to the Registrar of the Court and took no part in the proceedings.

The Originating Summons was heard before Cussen J. who decided that the chargee was not concerned with matters of account between the chargors *inter se,* and was entitled to an order for sale to recover the whole sum of $15,500 due upon the charge.

Murugappa appealed to the Court of Appeal, which set aside the order of Cussen J. and ordered *inter alia* that the Originating Summons be remitted to the Court below for hearing, and that the following issues be tried:—

(i) Is Meyappa a nominee or trustee for the respondent (the chargee) in respect of the half-share of the land registered in his name? and

(ii) what portion of the principal money secured by the charge had been repaid by or on behalf of the owners from time to time of the appellant's half-share of the said land?

The Court of Appeal also ordered that on the determination of the aforesaid two issues the respondent be at liberty, if so advised, to restore his application for the sale of the said land.

Letchumanan now applies for leave to appeal to the Privy Council. Mr. Ramani for the applicant argued, first, that the order of the Court of Appeal was a final judgment or order within the meaning of Rule 2(a) of the Rules under the F.M.S. Appeals Order in Council, and that the amount in dispute was of the value of £500, or else that the claim involved a civil right respecting property of that value, and that accordingly he was entitled to leave to appeal as of right. Alternatively he submitted that the question involved was one that by reason of its great general or public importance or otherwise ought to be submitted to the Privy Council for decision under Rule 2(b) of the same Rules.

As regards the first point, it is clear that the order with which this Court is concerned is the order of the Court of Appeal and it is immaterial to consider whether or not the order for sale made by Cussen J. was or was not a final order. The order of the Court of Appeal in directing that certain issues be tried, and that the Originating Summons should be reheard, was in effect an order for a retrial. It is certainly arguable that if the Privy Council set aside the order of the Court of Appeal and restored the order of Cussen J. the rights of the parties, so far as concerns the order for sale, would be finally determined, but, if on the other hand the Privy Council upheld the order of the Court of Appeal, the issues would have to be tried and other proceedings taken before a final adjudication between the parties were arrived at. An order for a retrial has always been treated as an interlocutory order, and I feel no doubt that an order which does not finally adjudicate the points in dispute unless the result of the re-hearing is in favour of the chargee, is an interlocutory order (see *Issacs & Sons v. Salbstein*, 1916, 2 K. B. page 147).

The only question that remains therefore is whether the Court ought to exercise its discretion in granting leave to appeal under Rule 2(b). The position is that if all the issues directed by the Court of Appeal are tried and decided in favour of Murugappa, he will have satisfied all claims against him by the payment into Court of $5,500, and no order for sale should be directed. If on the other hand the order for sale is made and the issues are tried afterwards under section 154 of the Land Code and decided in his favour, he will have suffered hardship by the sale of his interest in the land, such sale being subsequently proved to have been unnecessary. On the other hand even if all the issues are decided in favour of the chargee, his only complaint will be that the realisation of his security has been postponed. As it appears from the record that he obtained an order for sale as long ago as 1932, and failed to proceed with such sale, and as in the meantime he is secured by the charge in respect of principal and interest, his position is not very materially affected by the delay necessitated by the trial of the issues directed. I cannot see that any point of great general or public importance is involved, such as would justify the Court in facilitating the pursuit by the chargee of a course which may well involve Murugappa in great and irremediable loss.

In my opinion, therefore, the application should be refused with costs.

Application refused.

[APPELLATE CRIMINAL JURISDICTION]

RAJA MUSA, Ag. J.

December 12, 1938.

PUBLIC PROSECUTOR v. NAHAT SINGH.

(NEGRI SEMBILAN MAGISTRATE'S CRIMINAL APPEAL No. 27 of 1938)

Penal Code, S.304A—causing death by a rash act —plea of guilty—Magistrate's duty to record evidence.

The Respondent was charged with an offence under Section 304A of the Penal Code. At first he claimed trial and the hearing was adjourned. At the adjourned hearing he retracted his previous plea and pleaded guilty whereupon he was convicted and sentenced to a fine of $100/- or in default to 3 months' rigorous imprisonment. The Public Prosecutor appealed on the ground of inadequacy of sentence. The Respondent did not appeal. The trial Magistrate recorded no evidence but made a short note of the proceedings at the trial.

Held, that it is of the utmost importance that a Magistrate should take proper notes of evidence in a criminal case where the accused pleads guilty.

In this case the Appellate Judge decided to record evidence himself and on the evidence before him he considered that the sentence of the learned Magistrate was totally inadequate. The sentence was altered to one of 12 months' rigorous imprisonment.

MAGISTRATE'S CRIMINAL APPEAL.

Draper, Deputy Public Prosecutor, for Public Prosecutor (appellant).

Respondent in person.

Cur. Adv. Vult.

Raja Musa, Ag. J.—In this case the Respondent was charged with an offence under section 304A of the Penal Code. The Respondent at first claimed to be tried and the hearing was adjourned. At the adjourned hearing he retracted his previous plea and pleaded guilty upon which he was convicted and sentenced to a fine of $100/- or, in default, 3 months' rigorous imprisonment.

The Public Prosecutor thereupon appealed on the ground of inadequacy of sentence. The Respondent on the other hand never appealed.

The learned Magistrate recorded no evidence whatsoever. His only note on the case reads as follows:—

> "To-day accused pleads guilty on both charges. Understands the nature and consequences of his plea. States lorry skidded—Court accepts plea. Prosecuting Officer states scene at 23 mile Bahau—Tampin Road—No wheel-marks on road—lorry entered grass verge, got on to road again and ran into a bank on its right side 140 feet away where it fell. The deceased was a passenger in front seat; whole radiator smashed.